IN THE

Supreme Court of the United States

January Term, 1938.

No. [redacted] 16.

MARK O. DAVIS, *Petitioner*,

v.

MAUDE E. DAVIS.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATEMENT OF THE CASE AND ARGUMENT.

This is the identical case that was decided by the Court of Appeals of the District of Columbia, on February 23, 1932, and reported in 61 Appeals D. C., at page 48. A reference to the printed record now filed in this court, in connection with the petition for certiorari will show that the authenticated copy of the Virginia proceedings in the present record, was certified in 1929, and is the same record that the Court of Appeals of the District of Columbia had before it in 1932 and in 1937 and in 1938 (Rec. 39.) It is also the same authenticated copy of the Virginia proceed-

ings mentioned at page 49, in 61 Appeals, D. C., and at that time, February 23, 1932, the unanimous opinion of the five justices of the said Court of Appeals states:

> "After the lapse of about four years, to wit: on December 30, 1929, appellant filed a petition in the same case alleging that subsequent to the entry of the decree therein, he had become an actual *bona fide* resident of the State of Virginia, and that in a suit filed by him against his wife in the Circuit Court of Arlington County in that state, he had by lawful proceedings, been awarded a decree granting him a divorce a vinculo matrimonii from her. . . . . , appellant prayed the lower court (December 30, 1929) to set aside its order of October 29, 1925, or so modify the same as not to require appellant to pay any sum whatsoever to the appellee for her maintenance."

In this case decided in February, 1932, from which decision, in favor of the wife, the above is quoted, the D. C. Court of Appeals also said:

> "It may be noted that after the entry of the decree in the lower court, the appellee with her infant daughter, Susanne, has continued to reside in the District of Columbia, and that in the Virginia case, she appeared specially for the sole purpose of denying the jurisdiction of the court upon the ground that the plaintiff was not a *bona fide* resident of the state of Virginia, but was still a resident of the District of Columbia, and had fraudulently simulated a residence in Virginia, for the sole purpose of bringing the divorce case in the courts of that state." (See plea to Jurisdiction in Virginia, Rec. 32.)

And then in 1932, the D. C. Court of Appeals said, on page 49 of 61 Appeals, D. C.:

> "The appellants prayer is rested solely upon the decree entered by the Virginia court."

The case decided by the United States Court of Appeals for the District of Columbia, per decree of January 8, 1937,

Record 59, and again upon re-hearing March 7, 1938, Record 73, was decided upon the same Virginia decree that was before the lower court in 1929, and before the D. C. Court of Appeals and decided in 1932, and again in 1937 and again in 1938, as is above shown, and the rule of *stare decisis* applies for those decisions which nowhere contradict each other, and are the law of this case.

> "The rule of *stare decisis* is founded largely upon the consideration of expediency and sound principles of public policy, it being indispensible to the administration of public justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument." 15 Corpus Juris p. 304 and cases cited.

The petitioner for the writ of certiorari cites the case of *Cheeley* v. *Clayton*, 110 U. S. 701; and *Atherton* v. *Atherton*, 181 U. S. 155; and *Thompson* v. *Thompson*, 226 U. S. 551, and says that the decision of the D. C. Court of Appeals violates the principles decided in those three cases. *Cheeley* v. *Clayton, supra*, decides that the wife was entitled to share in the estate of her deceased husband, who had divorced her in the courts of Colorado, while she was living in Illinois, and this court refused to recognize the Colorado decree, based upon an order of publication held valid by the court of Colorado, but which this court held to be invalid. The decision is against the petitioner. *Atherton* v. *Atherton, supra*, decides that where the husband had always lived in Kentucky, and Kentucky was the only matrimonial domicile, that notice served upon the wife in another state, in accordance with the laws of Kentucky, entitled the husband to a decree upon proof that his wife had deserted him in Kentucky, without just cause. This decision is also against the petitioner. *Thompson* v. *Thompson, supra*, decides that Virginia having been the domicile of the husband, the only matrimonial domicile, the courts of Virginia had jurisdiction of the case. It was not dis-

puted that Thompson had always been a *bona fide* resident of Virginia. The matter went to the Supreme Court on the question of the sufficiency of the order of publication against the wife, who was then in the District of Columbia. The Supreme Court held it sufficient and said:

> "The parties were married in the state of Virginia, and had a matrimonial domicile there, and not in the District of Columbia or elsewhere. . . . The husband had his actual domicile in that state (Virginia) at all times, until and after the conclusion of the litigations."

This decision is also against the petitioner.

Petitioner says that the court below violated Sec. 1, Article *IV* of the Constitution, which requires that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Answer to that statement is found in the following decisions in divorce cases that went to the Supreme Court upon the very question raised by the petitioner here. All of these cases cited below, all cases of divorce in which the state, as well as the husband and wife, if concerned, and is a silent party, hold as follows:

1. That when a husband goes to a state solely for divorce purposes, he does not carry the marital *res* with him, and that the courts of the state to which he has gone, have no jurisdiction to entertain his suit for divorce.

2. That the recitals of the decrees entered in divorce cases in one state are not binding on the court of another state.

3. That the recitals of the decrees entered in one state in divorce cases may be contradicted in another jurisdiction.

4. That the *bona fides* of the residence of a party who obtains a divorce in one state may be inquired into by the courts of another state, and that the motives prompting the

party in making a change of residence may be inquired into by the courts of another state.

Bell v. *Bell*, 181 U. S. 175;
Streitwolf v. *Streitwolf*, 181 U. S. 179;
Andrews v. *Andrews*, 188 U. S. 14;
Haddock v. *Haddock*, 201 U. S. 502;
Simmons v. *Simmons*, 57 D. C. Appeals 216;
Frey v. *Frey*, 61 D. C. Appeals 232;
Cheeley v. *Clayton*, 110 U. S. 701.

Having in mind the foregoing decisions, the respondent by counsel, at the conclusion of the petitioner's case, offered the defendant and three witnesses, who would testify (1) that the plaintiff went to Virginia for the sole purpose of getting a divorce from the defendant, (2) that he never became an actual *bona fide* resident of that state, (3) that the examiner who took the testimony on the issue, presented by the defendant's plea to the jurisdiction of the Virginia court, acted as judge and jury on the admissibility and inadmissibility of evidence. Counsel for the plaintiff advised the court that he would admit that the defendant's witnesses, if present, would so testify, but that he would contend that such testimony was incompetent (Rec. p. 57). The admission was tantamount to saying that the Virginia decree was conclusive of the question of jurisdiction because on the plea to the jurisdiction, testimony was taken on that point and on that testimony, the court assumed jurisdiction, and that made the testimony incompetent in the District of Columbia court. The contrary has been decided by the Supreme Court and D. C. Court of Appeals in all the above cited cases. The court below held in 1929, that the wife did not submit the merits of the case to the Virginia Court. This opinion by Justice Bailey said in part: *"She did not submit the merits of the case to that court. Now the question is whether the matrimonial domicile of the parties was in that state. The decree of that court therefore, is not res adjudicata upon the latter question nor*

upon the merits of the case." (Rec. p. 56). Three times, as heretofore, pointed out, in 1932, and in 1937 and in 1938, the D. C. Court of Appeals has refused to consider the Virginia decree as *res adjudicata*, or as binding on the defendant upon the merits of the cause, which were never submitted to that court by the defendant. The case decided in 1929 in the court below by Justice Bailey was the case that was decided in the D. C. Court of Appeals in February 1932, and it was from that decision of Justice Bailey that the case was taken up. So the matter of the recognition of the Virginia decree was before the court below and the appellate court. Against the statement of counsel for the petitioner here that the question of the validity of the Virginia decree was not before the court at that time we quote from the decision of the D. C. Court of Appeals in February 1932, in this case following: "*The appellant's prayer is rested solely upon the decree entered by the Virginia court.*" (61 D. C. Appeals 49). The present counsel for the petitioner was not counsel in the case at that time and he has evidently not read that decision. That is a charitable view of his misleading statement.

Notwithstanding that decision of the D. C. Court of Appeals in 1932, we find this case again in the said court of appeals upon the same identical question of the recognition of the Virginia decree, which said decree the appellate court disregarded unanimously in 1932. And then on August 9, 1937, that court again held that the Virginia decree was of no avail in this case. Four judges sat in the case and one dissented and on petition, the dissenting justice granted a motion for a rehearing. The case was argued again before the three sitting Justices, Groner, Stephens and Miller, and the court unanimously decided that the Virginia decree was not entitled to full faith and credit in the District of Columbia. Justice Stephens, who had dissented in the previous decision, did not dissent in the decision of March 7, 1938, which was unanimous. There never was a case in which the doctrine of *stare decisis* so aptly applies.

The petitioner having submitted his case to the three sitting judges in the D. C. Court of Appeals, now says that the decision by three judges was not the full court of five required by the statute, although having first mentioned the matter in his petition, which he presented to one of the Justices asking for a rehearing on August 16, 1937. The case had been decided against him August 9, 1937. On March 7, 1938, it was again decided against him. When he asked for a full court, he knew he could not have a full court as Justice Edgerton did not qualify until February 1938, and Congressman Fred M. Vinson has never qualified. The act of February 9, 1893, (27 statutes at large 434) establishing the Court of Appeals for the District of Columbia, did provide that the court should consist of one Chief Justice and two associate Justices, and said that, if, for any reason, it should be impracticable to obtain a full court of three Justices, the member or members of the court present, shall designate a Justice or Justices of the Supreme Court of the District of Columbia, to make up a full court of three, and provided further that if the parties wish to stipulate in writing by their attorneys, a cause might be heard and determined by two Justices without calling on the Supreme Court. There was nothing in the act which required a full court to constitute a quorum. The act of June 19, 1930, (46 statutes at large 785), increased the number of Justices to five, and provided that they "shall have the same tenure of office, pay and emoluments, powers and duties, as provided by law, for the Justices of said court." There was nothing in the act requiring more than three judges to decide a case, just as there was nothing in the act of 1893 requiring more than two judges to decide a case. The court has been in existence forty-five years, and has decided thousands of reported cases, and often every year, by majority decisions, namely, two to one, from 1893 to 1930, a period of thirty-seven years, and since 1930, by majority decisions, both in civil and criminal

cases, regardless of a full court since 1930, and by two to one, when a full court was present from 1893 to 1930.

Not a single case is cited by petitioner to support the contention that in the absence of a statute a majority of a court could not decide a case. He cites a single case and that was where one judge disobeyed a statute requiring three in the court, and dismissed a bill. When three of the five judges decide a case the result would not be affected if the other two judges were there. If the objection made by the petitioner was sustained, as said by the Supreme Court in *Phillips* v. *Payne*, 92 U. S. p. 130, all its sentences, judgments and decrees, where the majority of the court decided cases in the absence of any of its members, would be a nullity, and in this case the serious consequences would run back 45 years in some cases and in others 8 years.

It is respectfully submitted that the petition for the writ be denied.

Respectfully submitted,

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